IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-793

HOUSTON LIGHTING AND POWER COMPANY, *Petitioner,*

and

ARIZONA ELECTRIC POWER COOPERATIVE, INC., *Petitioner,*

v.

INTERSTATE COMMERCE COMMISSION, et al., *Respondents.*

BRIEF AMICUS CURIAE OF MORRIS K. UDALL, PRO SE, IN SUPPORT OF JOINT PETITION WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTEREST OF AMICUS CURIAE

Amicus Curiae is a member of the United States House of Representatives where he serves as Chairman of its Committee on Interior and Insular Affairs and the Subcommittee on Energy and the Environment. He has represented the second district of the State of Arizona since 1961. In 1976, he was a candidate for President of the United States.

Since 1974, Amicus has been involved on a continuous basis with major aspects of the nation's very grave energy problems which are at the root of the dispute between the railroads and petitioners. Amicus, in recent years, successfully and unsuccessfully has sponsored and led the legislative efforts of the United

State Congress to deal with such important and controversial issues as national standards for the regulation of strip mining, the interstate transportation of coal by slurry pipeline, the preservation of the Alaska wilderness, the creation of an Energy Mobilization Board, the regulation of nuclear energy, and the transportation and delivery of Alaska oil and gas. As a consequence of his legislative experience and background in dealing with energy problems of national scope and impact, amicus perceives an issue of national significance that is both distinct from and broader than the issues presented by petitioners. It is the purpose of Amicus to underscore this circumstance for the Court.

Finally, while petitioners nominally bear and pay the railroad charges here in dispute, the real parties in interest are the electric consumers who ultimately pay these charges as a surcharge to their monthly electric bills. Many of the consumers paying the disputed charges here before the Court are residents of the second district of Arizona. Countless numbers of consumers from other districts will also be directly affected by the direction which is taken by coal transportation pricing. It is essential that the immediate interests of these persons be pressed in the present proceedings.

SUMMARY OF REASONS WHY WRIT SHOULD BE ISSUED

The Congress has been diligent and conscientious in its sustained

efforts to formulate a rational energy policy for this nation. Increased usage of domestic coal is the lynchpin to that policy. We have enacted legislation to foster increased coal usage while protecting our environment in connection with both the mining and the burning of coal.[1/] This carefully formulated approach, however, is going awry because of the unprincipled fashion in which the I.C.C. is administering the new Railroad Revitalization And Regulatory Reform Act Of 1976, Pub. L.

1/ See, e.g., Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 246; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat 685. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445.

No. 94-210, 90 Stat. 33 ("4-R Act") rate-making amendments[2/] as they apply to railroad rates on our nation's emerging bituminous coal traffic. In the case of coal, unlike most other fossil fuels, transportation usually constitutes the lion's share of the delivered cost of the fuel. The agency's unreasoned treatment of these critical questions is particularly offensive to Amicus

2/ These 4-R Act provisions amended existing sections of the Interstate Commerce Act ("Act"), then set out at 49 U.S.C. §1 et seq. Recently, the Congress recodified the Act, without substantive change. See the Revised Interstate Commerce Act ("Revised Act"), Pub. L. No. 95-473, 92 Stat. 1337 (1978). Provisions of the Revised Act now appear at 49 U.S.C. §10101 et seq.

because it is discriminatory as well as irrational and the citizens of Arizona will bear the brunt of this unfair and unlawful discrimination. If our system of government is to function in the best interests of the people, this Court must step in to ensure that the agencies accord a reasoned implementation of the laws enacted by the Congress, especially where the impact of the agency decisions will adversely affect the national welfare.

REASONS FOR GRANTING THE WRIT

(1) The Pricing Of Coal Transportation By Railroad Must Be Governed By Reasoned Standards

These are not the first cases raising consequential questions on how this nation's burgeoning coal transportation will be priced. The first case was Burlington Northern, Inc. v.

United States, 555 F.2d 637 (8th Cir. 1977). There the I.C.C. utilized the traditional determinants for maximum rail rates to prescribe a coal rate at a level two-thirds of that set a year later in Arizona. The court, in rejecting railroad interpretations of the 4-R Act accepted here by the I.C.C. and approved by the court below, stressed at several junctures a point which Amicus believes has a critical application here. Before the new 4-R Act ratemaking standard can be used to make railroad rates, the Commission must issue the rules and guidelines called for in this act and, in particular, the Section 205 "revenue need" guidelines. As to this requirement, the Burlington Northern Court noted:

> The issue of the particular methods to be adopted for realization of the goals established by the 4-R Act must first be decided by the Commission.

555 F.2d at 647

Despite the fact that Congress required the I.C.C. in Section 205 to "develop and promulgate" reasonable standards for implementation of the Section and notwithstanding the earlier refusal of the Eighth Circuit to apply the Section until the standards and procedures were formulated, the agency, in these crucial coal rate cases, plunged ahead without benefit of any rules or regulations to sanction vastly increased freight rates based solely on some ineptly articulated notions of railroad revenue need. While the lower court incorrectly affirmed the un-

reasoned actions because it perceived the I.C.C. determination to be a "temporary approach," the facts are otherwise. Petitioners show that the agency continues to this day to set coal rates in such an erratic and unreasoned manner that one member of the Commission has termed the process as a "wholesale retreat from reasoned decisionmaking." Annual Volume Rates On Coal -- Wyoming To Flint Creek, Arkansas, Docket No. 36970, and Southwestern Electric Power Co. v. Burlington Northern, Inc., Docket No. 26980 (Combined decision served May 25, 1979) (not officially printed) (Dissenting opinion of Commissioner Christian served June 20, 1979 at sheet 1) (not officially printed), appeals docketed sub nom. Burlington Northern, Inc. v. United

States, No. 79-1547 (D.C. Cir., filed May 25, 1979) and Southwestern Electric Power Company v. ICC, No. 79-2082 (5th Cir., filed May 3, 1979). Indeed the United States is cognizant of both the lack of standards and the importance of the coal transportation at issue. In a recent brief challenging the legality of one of the Commission's unreasoned coal rate decisions that followed the actions Petitioners' here attack, the federal government argued that:

> Seldom in the 92-year existence of the Interstate Commerce Commission has the need for informative and intelligible findings been more acute ....

Brief for Respondent United States of America, San Antonio, Texas v. United States, No. 78-2051 (D.C. Cir., filed Oct. 25, 1978).

The Congress in its enactment of Section 205, the Eighth Circuit in the initial judicial encounter with the 4-R Act ratemaking provisions, and the United States of America, are of one voice as to the need for rational railroad rate-making guidelines to govern the rates charged on our nation's emerging and vital traffic in bituminous coal. The I.C.C. stands alone in its cart-before-the-horse approach.

The failure of the I.C.C., abetted by the lower court, to administer the law as enacted by the Congress and in the fashion directed by the Congress, has brought uncertainty and confusion to the important principles of coal transportation pricing.

As an elected representative who is actively engaged in the difficult task of legislating programs to deal with our nation's critical energy problems, Amicus firmly believes that the federal agencies must be particularly sensitive to the impact of their decisions on the programs that the Congress has devised to meet national energy needs. This belief is reflected in the laws passed by the Congress.3/ To carry out the intent of the Congress, it is absolutely essential that the agencies act in a rational fashion.

3/ See, e.g., The Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 371. (1975) (Federal agencies including the I.C.C. directed to issue energy impact statements in designated major regulatory proceedings.)

Particularly in the area of energy transportation, arbitrary and irrational agency decisions are likely to upset the delicate balance of national economic, social and political interests that the Congress has incorporated into its legislative programs. Because the I.C.C's actions in the coal rate cases lack the essential element of sound decision-making, our nation's energy, inflation and consumer protection policies are thrown into disarray. It is the responsibility and, indeed, the duty of the Court to hear and resolve these questions of indisputable consequence to our nation's future.

In addition, Amicus believes that it is quite likely that the strong opposition to the Commission's decisions now being registered before the federal

circuits will result in a maze of separate opinions that will further exacerbate the present uncertainties. This Court's definitive review is necessary to avoid this unhappy result. Although the Court could wait for the anticipated problems to fester before review, such an action would be of little solace to the petitioners. Due to the peculiarities of the section under which the respondents filed petitioners' rates, this Court's failure to set aside the lower court's decisions will make it impossible for petitioners even to begin to challenge the approved rates until November, 1982.4/

4/ The respondents filed their rate schedules pursuant to 49 U.S.C. §10729 immediately after the Commission's November, 1977, decisions. This section states in pertinent part:

The important national interests at stake, combined with the petitioners unfortunate inability to obtain remedial relief without judicial action, makes the decisions entered below particularly ripe for review by this Court at this time.

(2) Coal Rates Which Are Discriminatory Are Manifestly Unfair

The cornerstone of our system of railroad regulation is its absolute proscription against undue discrimination. The rendition of like transportation services to similarly situated shippers at different rates was viewed by the

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> Once a rate, classification, rule or practice become effective under this section, the Commission may not, for five years, suspend or set it aside [as unreasonably high or discriminatory]....

49 U.S.C. §10729(b).

Congress as the greatest evil to be overcome through enactment of the Interstate Commerce Act. As stated in the influtial 1886 Senate Report concerning the Act:

> no excuse can be offered for any discrimination in the charges made by a common carrier as between persons similarly situated for whom a like service is performed under similar circumstances. This is the most flagrant and reprehensible form of arbitrary discrimination. Individual favoritism is the greatest evil chargeable against the management of the transportation system of the United States.

S. Rept. No. 46, 49th Cong. 1st Sess. 188 (1886)

Today, some ninety years after the original enactment of the Act in 1887, the language of the Revised Act continues to reflect the Congressional intent to eradicate prejudicial "favoritism."

Prohibitions Against Discrimination By Common Carriers

> (a) A common carrier providing transportaion subject to the jurisdiction of the Interstate Commerce Commission ... may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

Revised Act §10741, 49 U.S.C. §10741.

Despite the long standing resolve of Congress to eradicate unjust discrimination, the I.C.C. has, nevertheless, in its actions below permitted this deplorable situation to occur. As petitioners show, the electric consumers

of Arizona are being made to pay nearly 300 percent more for unit coal train transportation than other similarly situated coal receivers. Clearly, differences of this magnitude constitute a classic example of transportation discrimination.

This Court has observed that a rate may be set at a reasonable level and yet still be unlawfully discriminatory. United States v. I.C.R. Co., 263 U.S. 515, 524 (1924); I.C.C. v. Inland Waterways Corp., 319 U.S. 671, 685 (1943). Accordingly, should the Court conclude that the levels of the assailed rates are somehow the product of reasoned ratemaking, there is no way to justify the resultant flagrant discrimination which has been directed against the electric consumers of the

State of Arizona. If Arizona is made to pay rail rates twice to three times those paid by other coal receivers, we have an unconscionable situation which furnishes an independent basis calling for this Court's review.

CONCLUSION

In the past, and properly so, this Court has supplied definition and direction on important aspects of our nation's drive for energy independence. In Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978), the Court gave direction to important questions on the economics of oil pipelines. In Kleppe v. Sierra Club, 427 U.S. 390 (1976), the Court spoke to environmental issues connected with the mining of the coal moving to Houston. The decisions below

involving the economics of coal transportation, in the judgement of Amicus, are at least as consequential to the success of energy and economic independence and deserve this Court's consideration.

Respectfully submitted,

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